UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

HILTON RESORTS CORPORATION d/b/a ELARA	
and	**Case 28-CA-193521**
THOMAS MALIN, an Individual	
and	**Case 28-CA-195042**
DOMINICK GIOVANNI, an Individual	
And	**Cases 28-CA-199122 28-CA-206207**
INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 501, AFL-CIO	

Nathan A. Higley, Esq., for the General Counsel.

Alan. I. Model, Esq. (*Littler Mendelson P.C.*),
for the Respondent.

Justin M. Crane, Esq. (*The Myers Law Group, A.P.C.*)
for the Charging Party Union.

DECISION

STATEMENT OF THE CASE

Ariel L. Sotolongo, Administrative Law Judge. At issue in this case is whether Hilton Resorts Corporation d/b/a Elara (Respondent or Employer) unlawfully withdrew recognition from International Union of Operating Engineers (Union or Local 501) by relying on an employee petition signed by three individuals alleged to be 2(11) supervisors, without whose signatures the petition would not have constituted or represented a majority of the bargaining unit. Also at issue is whether Respondent unlawfully denied employee requests for union representation during investigatory interviews, and whether Respondent unlawfully suspended and later discharged one such employee for refusing to submit to an alcohol test without first

being afforded the opportunity to obtain to union representation. Finally, at issue is whether the Union bound Respondent to a collective-bargaining agreement after accepting Respondent's last, best, and final offer following Respondent's withdrawal of recognition, an issue that turns upon whether the withdrawal of recognition was valid in the first place.

I. Procedural Background

Based on charges filed by the Union in Cases 28−CA−199122 and 28−CA−206207, on a charge filed by Thomas Malin (Malin) in Case 28−CA−193521, and on a charge filed by Dominick Giovanni (Giovanni) in Case 28−CA−195042, the Regional Director for Region 28 of the Board filed a complaint on January 16, 2018. The complaint, which was the second amended complaint following earlier versions, alleges that Respondent violated Section 8(a)(1) of the Act by denying Giovanni and Malin their requests for union representation during disciplinary interviews, and violated Section 8(a)(3) and (1) of the Act by discharging Malin, based on his denied request for such representation.[1] The complaint further alleges that Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union on September 14, 2017, and by failing to prepare and execute a collective-bargaining agreement the terms of which that had been accepted and agreed upon by the Union following Respondent's last, best, and final offer. I presided over this case in Las Vegas, Nevada, on April 3–5, 2018.

II. Jurisdiction and Labor Organization Status

The complaint alleges, and Respondent admits, that at all material times Respondent has been a corporation with an office and place of business in Las Vegas, Nevada, where it is engaged in the operation of a hotel and timeshare facility. The complaint further alleges, and Respondent admits, that during the 12-month period ending on February 11, 2017, in conducting its business operations, Respondent had gross revenues in excess of $500,000, and purchased and received at its Las Vegas facility goods valued in excess of $50,000 directly from points outside the State of Nevada. Accordingly, I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The complaint alleges, Respondent admits, and I find that at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. Findings of Fact

A. Background

The following background facts are not in dispute, and as noted some were stipulated to by the parties. As described above, Respondent operates a hotel and time-share facility in Las Vegas, near the "Strip," which it acquired from prior owners/operators in 2012.[2] The facility has 1200 guest rooms in a 51-story tower building, which includes a swimming pool and spas. As

[1] On August 7, 2018, the General Counsel advised that Mr. Malin, the Charging Party in Case 28−CA−193521 and alleged discriminatee, had passed away.

[2] Prior to being taken over by Respondent Hilton, the facility has been owned (or operated) by Planet Hollywood.

discussed in more detail further below, the issue(s) in this case revolve around the employees in Respondent's engineering department (also called the maintenance department), who perform maintenance and repair work at the facility. The engineering department is headed by the chief engineer (CE), a position held by Luis Montenegro (Montenegro) since late 2015 or early 2016. Below him is the assistant chief engineer (ACE) Vern Savage (Savage), who has been in that position since mid-2015, and who is in charge of the day-to-day operations of the engineering department. Below Savage, and reporting to him, are three maintenance (or engineering department) "supervisors" (herein referred to as "MS" or "MSs"), positions that are currently held by Fred Rau (Rau), Vince Sutton (Sutton), and Jarrett Cooke (Cooke).[3] Rounding out the remainder of the engineering department are the "tower engineers," who primarily perform maintenance and repair duty in the guest rooms in the tower (but some of whom also perform maintenance in the pool and spas), mechanical engineers (who perform maintenance and repair in the "back of the house," such as the heating and air conditioning equipment), painters, a carpenter, and a locksmith. Including the MSs, and excluding Montenegro and Savage, there were a total of 24 employees in the engineering (or maintenance) department as of September 2017 (GC Exh. 3).[4] Additionally, there is no dispute that at all material times, the following individuals were supervisors and agents of Respondent, and held the following positions: Michael Ellis (Ellis), assistant general manager; Brenda Herrera (Herrera), senior human resources (HR) manager; Michael Garces (Garces), front desk manager; Mark Anthony Boykin (Boykin), director of security; Greg Swierczek (Swierczek), security assistant manager; and Odd Owen (Owen), director of HR.

On September 21, 2013 the Union filed a representation petition in Case 28−RC−117571, seeking to represent a bargaining unit comprised of "all full time and regular part-time maintenance and engineering department employees," employed by Respondent, excluding "all other employees, clerical employees, chief engineer, assistant chief engineer, guards and supervisors as defined in the National Labor Relations Act." Following a hearing, on December 30, 2013, the Regional Director issued a Decision and Direction of Election (DDE), finding (contrary to the Employer's position but consistent with the Union's position) that the three MSs were statutory supervisors and excluded from the bargaining unit, but finding (contrary to the Union's position) that the locksmith should be in the bargaining unit (GC Exh. 15).[5] The Employer appealed the Regional Director's decision with regard to the supervisory status of the MSs, but before the Board could rule on the matter, on January 22, 2014, the Union withdrew its petition. Nine months later, on October 17, 2014, the Union filed a new petition in Case

[3] At the heart of this case is the issue of whether Rau, Sutton, and Cooke are 2(11) supervisors, as will be discussed more thoroughly below. In light of this, I am intentionally avoiding the use of the term "supervisor(s)" when referring to them, even though that is part of their title, in order to avoid confusion or creating the appearance of having prejudged their status. Accordingly, I will use the term "MS" when referring to one of them or "MSs" when referring to all three.

[4] General Counsel's exhibits will be referenced as "GC Exh.," followed by the exhibit number(s); Respondent's exhibits will be "R. Exh.," followed by the exhibit number(s); and transcript pages will be "Tr." followed by the page number(s).

[5] At the time, the three MSs were Sutton, Cooke, and Anthony Sandifer, who retired and was replaced by Rau within the following year. In describing these events, I note that for the purposes of this decision, I am not in any way bound by the factual findings or legal conclusions in the 2013 DDE by the Regional Director, whose decision was never reviewed or affirmed by the Board. Rather, I am including these undisputed background facts to provide context for the events that followed. In this regard, my findings of fact and legal conclusions must be based, exclusively, on the evidence presented during the hearing in the instant case.

28−RC−138964. Apparently, however, the Union did not specifically seek to exclude the MSs from the bargaining unit on this occasion, although it did not seek to include them, either. The parties agreed to an election by entering into a Stipulated Election Agreement, with the understanding that the Union could challenge the MSs if it chose to do so (R. Exh. 2; 3). The election was conducted on November 21, 2014, and all 25 individuals on the *Excelsior* list voted, including the three MSs, who voted without challenge. The Union prevailed by a vote of 14 to 11, and on December 4, 2014, the Regional Director certified the results of the election.

Over the course of the next 3 years or so, Respondent and the Union engaged in collective-bargaining negotiations, but at least through mid-September 2017 had not reached a final and binding agreement.[6] During the course of negotiations, the parties assumed that MSs were part of the bargaining unit and were thus represented by the Union, and the negotiations proceeded on that basis.[7] Indeed, one of the "tentative agreements" ("TA's") that the parties reached over the course of negotiations was to change the title of MSs to "lead engineers," consistent with the official title of similar employees employed at a sister facility of Respondent (the Hilton Grand Vacations), whose engineering department employees were also represented by the Union (Tr. 469).

As described above, it is undisputed that as of September 2017 the bargaining unit, including the three MSs, consisted of 24 individuals (GC Exh. 3). It is likewise undisputed that on September 8, 2017, via a letter attached to an email sent to the Union on that date, Respondent withdrew recognition from the Union (GC Exh. 8; 9).[8] The withdrawal of recognition was strictly based on a petition signed by 13 individuals in that bargaining unit, including the three MSs (GC Exh. 5).[9] The parties also stipulated that if the withdrawal of recognition was invalid (because the three MSs are found to be statutory supervisors), the parties would be bound to a collective-bargaining agreement, the terms of which were accepted, and which was executed by the Union after the withdrawal of recognition (Tr. 441−443; GC Exh. 11).

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[6] As briefly mentioned above, one of the as alleged in the complaint, is whether the Union accepted Respondent's last, best and final offer at the end of September or beginning of October, therefore binding Respondent to an agreement, an issue which in turn rests on whether Respondent had lawfully withdrawn recognition earlier, on September 8. As discussed below, however, the parties stipulated that if the petition relied upon by Respondent to withdraw recognition from the Union was invalid, a binding collective-bargaining agreement was in effect upon the Union's acceptance of Respondent's last offer shortly after recognition was withdrawn.

[7] The parties stipulated that the Union represented the MSs as part of the bargaining unit (Tr. 441).

[8] Although par. 6(d) of the complaint alleges that Respondent withdrew recognition from the Union "[A]bout September 13, 2017," the evidence clearly shows that this occurred on September 8, as shown by the above-referenced exhibits as well as uncontested testimony.

[9] Indeed, the petition was drafted and circulated by Sutton, one of the three MSs (Tr. 120−123). Curiously, there is no allegation that the petition was "tainted" by the involvement of Sutton, who the General Counsel alleges is a statutory supervisor. This may be because if Sutton and the two other MSs are indeed statutory supervisors, there would only be 10 valid signatures left in the petition, in a unit reduced to 21 in total—and the petition would therefore no longer represent a majority of the bargaining unit, making the withdrawal of recognition unlawful and rendering moot any "taint" allegation.

B. The Alleged Denial of Union Representation to Giovanni by Savage

Dominick Giovanni (Giovanni) was a "tower engineer" that was assigned to perform maintenance and repair duties on the guest rooms in the tower, most of the time on its upper tier (or upper one third of the 51-floor tower), both by preference and custom. He testified that on January 7,[10] after finishing a job in one of the rooms in the tower, he rode in a guest elevator on his way to another floor on the tower. He acknowledged that this was against company policy, which required maintenance engineers to use the service elevators, particularly if they were wearing their tool belts (as Giovanni was), unless it was an emergency. As he got off the guest elevator, he noticed that Assistant Chief Engineer Vern Savage (Savage) had seen him exiting the elevator. A couple of hours later, Savage called Giovanni on the radio and asked him to come to his office. As Giovanni walked into Savage's office, Savage handed him a piece of blank paper and told Giovanni that he wanted him to write down why he felt he should be able to ride in the guest elevators. Giovanni responded "no, I am invoking my Weingarten rights." According to Giovanni, Savage then continued to talk, telling him, repeatedly, that he had photos (or videos) of Giovanni riding in the guest elevator, and that he was going to "write him up," and wanted to know why Giovanni felt he could ride in the guest elevators—again insisting that he write something down on the paper. Giovanni said, no, and after a few minutes of listening to Savage, Giovanni finally took the piece of paper, and walked out of Savage's office, saying he would write something later. According to Giovanni, the meeting lasted about 10 minutes altogether before he walked out (Tr. 196−199; 246−248).

Savage testified that about January 14 he observed Giovanni using the guest elevators while on duty, which was in violation of company policy. He summoned Giovanni to his office, and when he arrived he told Giovanni that he wanted him to write a statement as to why he felt it was necessary to use the guest elevators, after having been told in the past not to do so. According to Savage, he did not give Giovanni a piece of paper, and testified that Giovanni never invoked his "Weingarten rights," neither using that precise term nor asking for a union representative.[11] According to Savage, Giovanni said that he was too busy and would write a statement later in the day, then left the office. Savage told Giovanni that was fine with him, since this was request, not a directive. Giovanni never submitted the requested statement, and Savage reviewed the security videotapes to confirm what he had observed (Tr. 52–55; 520−529). About 3 weeks later, Giovanni received a disciplinary write-up from Montenegro for the elevator incident, although this disciplinary action is not alleged as a violation in the complaint. (Tr. 55; 199.)

As can be gleaned from the above, Giovanni's version of events differs from Savage's in two distinct ways: first, Giovanni testified that he invoked his Weingarten rights early during his meeting with Savage, something that Savage denied. Second, in Giovanni's version, the meeting lasted about 10 minutes, much of it after he had invoked his Weingarten rights, with Savage

[10] All dates hereafter shall be in calendar year 2017, unless indicated otherwise.

[11] Savage admitted, however, that in the past Giovanni had always invoked his Weingarten rights under similar circumstances (Tr. 529). Giovanni confirmed that this was his practice, explaining that he had been advised by the Union to do so. Indeed, Giovanni testified that the Union had provided them with "pocket protectors" for holding pencils in their pockets containing a description of their Weingarten rights (Tr. 198). He also testified that most of the time, after invoking his "Weingarten" rights, another employee, such as Felix Teniente or Al Castillo, would end up acting as a "representative" for him. (Tr. 241−242).

insisting that he write a statement several times, and telling him that he had been observed in photos (or videos) in the elevator, until Giovanni finally walked out. In Savage's version, although he did not testify how long the meeting actually lasted, it appears to have been over quickly, with Savage asking Giovanni to write a statement about why he was using the guest elevators, and Giovanni simply stating that he was too busy and would do it later—then leaving. Although the demeanor of both witnesses did not reveal any reason to doubt the testimony of either witness, with both witnesses appearing to be candid, I note that Giovanni offered a far more detailed description of the meeting than Savage, noting that Savage kept insisting—after he had invoked his Weingarten rights—to give a statement, something that Giovanni testified felt demeaning. Moreover, as Savage admitted, it was Giovanni's consistent practice in other occasions to invoke his Weingarten rights, which makes it highly probable that he did so on this occasion as well, as Giovanni testified he did. This is particularly true in these circumstances, since Giovanni had seen Savage looking at him getting off the elevator, and knew, or at least had good reason to believe, that when Savage summoned him to his office, disciplinary action was a distinct possibility. In these circumstances, I find that Giovanni's version of events is the more accurate and credible one, and I therefore credit his account.[12]

Accordingly, I find that Giovanni invoked his Weingarten rights early in his meeting with Savage, who nonetheless repeatedly continued to insist that Giovanni write a statement about why he felt he could use the guest elevators, reminding Giovanni that he had photographic evidence of his conduct.

C. The Alleged denial of Union Representation to Malin, and His Suspension and Discharge

Thomas Malin (Malin) worked as a "tower engineer" for Respondent for about 3 years until his discharge in March 2017.[13] He testified that on February 17, he attended a "pre-shift" meeting at 3 p.m. conducted by MS Vince Sutton and attended by MS Jarrett Cooke, with whom he had a brief conversation, and other maintenance engineers on duty at the time.[14] Around 4:30 p.m., Cooke contacted Malin by radio and asked him to report to the security office. When Malin arrived, he saw Cooke, Security Assistant Manager Gregg Swierczek, and Front Desk Manager Michael Garces in the office. Cooke informed Malin that HR Manager Brenda Herrera was on her way down with some paperwork. Malin, who admitted he was angry at the time, told Cooke "you should know better than to call an impromptu meeting without a union representative here," adding that he was busy with service calls and had work to do, and then left before anything else what said and before Herrera arrived.[15] He went back to work in the tower,

[12] In making this credibility determination, I have considered the memo written by Savage about this meeting on January 23, about 10 days after the incident, in which he states, inter alia, that Giovanni never invoked his Weingarten rights or otherwise asked for representation. (R. Exh.8.) I do not give this statement much weight, as it appears to be an ex post facto rendition written after Savage had the time to consider or ponder the possible consequences of his actions.

[13] He was classified as a "Maintenance Tech II."

[14] As more thoroughly discussed below, pre-shift meetings are daily meetings held with the maintenance crews at the beginning of the day and swing shifts, to provide information about things that are going on or expected to occur during the course of the day. These meetings are usually conducted by MSs, who typically read from a document that includes information such as occupancy rates and events taking place at the hotel.

[15] Malin explained that he was angry because he saw Cooke openly showing his tattoos, which are in violation of company policy, to the others in the office, something he felt Cooke was unfairly getting away with. He also

and a short while later received another radio call from Cooke asking him to come to the security office. Malin told him he would not come down unless he had union representation. Malin then went to the 23rd floor to see fellow maintenance engineer Will Bumpus, to talk to him about a work-related issue, and after speaking with Bumpus headed to the service elevator.[16] When the door to the elevator opened, he saw Herrera, Cooke, Garces, Swierczek, and Assistant General Manager Michael Ellis inside. Malin noticed Herrera, who was closest to him, had some paperwork on her hands that said "Concentra" on it, which Malin knew was the name of an alcohol/drug testing facility used by the Employer. Before boarding the elevator, Malin said to Herrera "get out of here with that shit" (meaning the paperwork), and as he boarded the elevator said he "wanted a union representative here now." Herrera told him he needed to go to Concentra, otherwise he would be suspended pending further investigation. Malin, who admitted being angry and raising his voice, replied that this was a "witch hunt," and saying "fuck you, Brenda, I am tired of this shit, fuck you," while waiving a finger next to her face. When Ellis told Malin that he could not speak to Herrera like that, Malin responded to Ellis "fuck you." Most of this occurred as the elevator was moving, and by the time the elevator reached the first floor Herrera told Malin that he was suspended pending further investigation.[17] Notably, Malin, in response to a direct question during cross-examination, denied that he was under the influence of alcohol during the events of February 17 described above.[18] (Tr. −; 416−418; 423−427.)

Malin further testified that he then went to the security office to turn in his keys and radio, and that he told the security officer present "to stick it up his ass." Sometime thereafter, he received a letter from Respondent informing him he was suspended, and on February 22 he and Union Representative Kevin Million met with HR Director Todd Owen at Respondent's facility. Owen informed Malin that Respondent was investigating the incident, and wanted to ask some questions and hear his side of the story. They viewed video (without audio) of the incident in the elevator, and Malin answered Owen's questions, as Million advised him to do. Thereafter, on March 22, Malin received a letter from Respondent informing him that he had been discharged (Tr.408−412.)[19]

Herrera testified that on the day in question, she received a call from Cooke asking her to come the security office, explaining that Malin appeared to be intoxicated and was being loud and boisterous. She went down to the security office and met with Cooke and Swierczek, and Cooke informed her that he had smelled alcohol in Malin's breath during the pre-shift conference, and had observed Malin spilling food from his mouth as he ate. Cooke told Herrera

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explained that he had received a disciplinary warning about 10 days before from Herrera, and believed that the current meeting was more of the same, hence his remark about union representation. (Tr. 399−400.)

[16] Malin testified that he spoke to Bumpus about a rumor that Bumpus had allegedly stolen a pair of athletic shoes from a guest room, and that he had been told Union Agent Million was visiting the facility that afternoon to meet with Herrera and others about this issue. Herrera confirmed that Million was in the facility about half an hour before she was called about the Malin situation. (Tr. 422−423.)

[17] Malin also testified that after he said he wanted union representation as he boarded the elevator, Herrera offered to have Bumpus serve as a witness if he wanted one. (Tr. 405; 429−430.)

[18] Malin also denied that he was under the influence of alcohol during bargaining sessions between the Employer and the Union that he attended (Tr. 416), testimony that appears to be contradicted by the testimony of Union Representative Kevin Million, as discussed below.

[19] Curiously, neither the General Counsel nor Respondent offered the February suspension letter or March termination letter into evidence. I can only surmise that the reason may be because these letters did not provide any explanations for the actions, and only informed Malin of the action being taken.

that he and Swierczek had tried speaking with Malin, but that he was loud and boisterous and had refused.[20] Ellis and Garces also came down and joined Herrera, Cooke, and Swierczek, and they then boarded an elevator to go to the 23rd floor, where they believed (apparently based on radio traffic) Malin was located. Herrera had brought with her the forms for Concentra, the facility Respondent employs to do alcohol/drug tests on employees, and had those forms in her hands as she stood at the front of the elevator. When the doors of the elevator opened on the 23rd floor, Malin was standing there, ready to board. According to Herrera, Malin immediately started yelling at her as he boarded, saying "no Concentra, no Concentra, I am not fucking going," as well as saying "fuck you" to her multiple times. Herrera admitted that Malin also said he wanted a union representative, and she offered to have Bumpus act as a (Union) witness for Malin if he wished.[21] She further testified that she informed Malin of Respondent's policy requiring cooperation with drug/alcohol testing and possible suspension or termination for refusal to cooperate. Specifically, she told Malin that based on the fact that he appeared to be drunk, the test was his opportunity to prove otherwise, and that he would be compensated for his time away from work (to take the test). By the time the elevator reached the first floor, Herrera told him he was suspended pending further investigation (Tr.140−143; 145−154; 158−161).

Herrera testified that she made the decision to discharge Malin based on a combination of reasons. Initially, she testified that she decided to discharge him because she was unable to determine his sobriety in light of his refusal to take the test (at Concentra). She further explained, however, that the decision to discharge him was based on his over-all conduct that day, including his inappropriate conduct in the elevator and his smelling of alcohol (Tr.156;163;166).[22]

MS Vince Sutton testified that around 3 p.m. on the day in question, just as he was ending his shift, he was sitting in the maintenance office next to Cooke when they heard a loud bang and then heard Malin yell "Jarrett" (Cooke's first name), followed by Malin yelling "Fuck this. Who the fuck the shit is putting this shit in front of my locker? These mother fuckers."[23] During the pre-shift meeting that followed immediately thereafter, Sutton observed Malin spilling food out of the side of his mouth as he ate a sandwich, repeatedly muttering things like "fuck" or "fuck this place," and smelling of alcohol as he walked passed Sutton. Sutton, whose shift was just ending, called (chief engineer) Montenegro, who directed him to call security. The security dispatch informed Sutton that Swierczek was the security manager on duty, and Sutton

[20] Herrera clarified that initially Sutton had called Ellis to inform him about Malin's odd behavior during the pre-shift meeting, and Ellis then called Cooke and Swierczek, and in turn Cooke called her (Tr.160−161).

[21] It appears that the Union, despite representing unit employees for about 3 years, never officially appointed a shop steward at the facility, and although the issue was not addressed on the record in a significant way, the evidence suggests that in practice employees in the past had used other (union-supporting) employees as "witnesses" during disciplinary meetings.

[22] The General Counsel, through Herrera, introduced Respondent's Drug and Alcohol Abuse policy (DAAP) into evidence (GC Exh. 6). Herrera admitted the policy called for the discharge of employees who refused to cooperate with testing, as reflected at the end of the first paragraph on page 9 of the policy (GC Exh. 6(i); Tr. 150−151). It should also be noted, however, that Respondent's DAAP prohibits employees from being under the influence of alcohol or drugs while on duty, and provides that an employee's "job performance, appearance, behavior, body odors or speech" can provide reasonable cause for mandatory testing.

[23] Sutton testified Malin had found a cart in front of his locker and had slammed it against the lockers, producing the loud bang.

then went to speak to him. He told Swierczek what he had observed with regard to Malin, and Swierczek told Sutton he would take care of it. Sutton then went home (Tr. 596−599).

Security Supervisor Swierczek testified that on February 17, Sutton informed him that Malin was behaving unprofessionally and appeared to be intoxicated during the pre-shift meeting. Swierczek called his boss, Mark Boykin, who advised him to call the front desk manager. Swierczek called Michael Garces, the front desk manager on duty, as well as Herrera and Cooke, and they decided to meet in the security office, where there was a large conference room. He and Cooke arrived there first, and called Malin to come down to the security office. When Malin arrived, he spoke first and said, in a boisterous manner, "you should know better than have a meeting like this without a shop steward present. You are on my time," and he then walked away. Shortly thereafter, Herrera and Garces arrived, as well as Ellis (the assistant general manager). They discussed the situation, and Ellis decided that if Malin wasn't going to come to them, they should go to him, and they proceeded to board the elevator to go the 23rd floor, where Malin was. When the elevator door opened on the 23rd floor, Malin was standing right there. Malin then boarded the elevator, while telling Herrera "you're not going to get me on no goddamn witch hunt, no Concentra, no Concentra," while waiving his index finger close to Herrera's face. Malin also kept saying "fuck you" to Herrera, and when Ellis told Malin he couldn't speak to Herrera in such manner, Malin said "fuck you" to Ellis. Swierczek also testified that Malin appeared to be intoxicated—he was off balance, his eyes were glassy and red, and his breath smelled of alcohol (Tr. 556−562).

In reviewing the above-described testimony regarding the events of February 17, it becomes apparent that many of the salient facts are not in dispute, although there are small but immaterial variations among the witnesses' testimony regarding specific details of the events. Thus, for example, the following facts are not in dispute regarding these events:

- Malin was called to the security office, and when he arrived he saw Cooke and Swierczek (and perhaps Garces as well, in Malin's version) waiting for him;
- Almost immediately, Malin stated that they should know better than call him to a meeting without Union representation (or shop steward) present, and walked away before the meeting could proceed;[24] Cooke contacted Malin via radio shortly afterward to again ask him to come to the security office, but Malin refused, again stating that he would not meet without a union representative present;
- Cooke, Swierczek, Herrera, Garces and Ellis soon converged in the security office and then boarded an elevator to the 23rd floor of the tower, where they knew Malin was located. Herrera was holding paperwork that visibly displayed the word "Concentra," which was known as the facility used by the employer to conduct alcohol/drug testing;
- When the doors of their elevator opened on the 23rd floor, Malin was standing on the platform ready to board the elevator. As he boarded, he noticed the "Concentra" paperwork Herrera was holding and immediately informed her that he wanted no part of

[24] Both Cooke and Swierczek testified that after Malin left, Cooke again contacted Malin by radio and tried to persuade him to come back to the office, but Malin refused, again repeating that he would not meet in the absence of a union representative. Malin did not deny their testimony in that regard, and thus I credit it.

that, although not exactly in those words.[25] Thus, he said "get out of here with that shit" and "No Concentra, No Concentra, I am not fucking going." Malin then asked for Union representation. Herrera offered to have Malin's fellow maintenance engineer, Bumpus, serve as a witness for him;

- Malin raised his voice and repeatedly said "fuck you" to Herrera while waiving a finger in her face, and said "fuck you" to Ellis when he admonished Malin not to address Herrera in such manner;
- Herrera, during the elevator ride, informed Malin that he would be suspended if he refused to cooperate with the testing, and by the time the elevator reached the first floor, she told Malin that he was suspended pending further investigation.

A point of contention regarding the events of February 17 is whether Malin was inebriated, or was at least exhibiting signs and behavior indicating that he was. As discussed above, Malin denied that he was under the influence of alcohol on that date. On the other hand, Sutton, Cooke, Herrera, and Swierczek consistently, and credibly, testified that Malin was exhibiting clear and unmistakable signs of alcohol intoxication, including the smell of alcohol in his breath, loud and belligerent behavior, poor balance, glassy bloodshot eyes, and the spilling food from his mouth while eating. Moreover, I note Malin denied being intoxicated during a bargaining session between the Employer and Union on a separate occasion, or being asked to leave for that reason, testimony that was contradicted by Union Agent Million, whose testimony would normally be expected to be favorable toward Malin.[26] In my view, this not only diminishes Malin's credibility, but establishes a pattern of behavior on his part that makes his alleged conduct on February 17 more likely to have occurred. Accordingly, I conclude that on February 17 Malin was inebriated, or at least exhibited signs and behavior that would lead a reasonable person to conclude that he was under the influence of alcohol.[27]

It is undisputed that on February 22, Malin, accompanied by Union Representative Million, attended a meeting with HR Director Owens, during which they discussed the events of February 17 and Malin answered questions and was provided an opportunity to tell his side of the story, as Malin testified. It is likewise undisputed that Malin was discharged on or about March 22, the date he received a letter to that effect from Respondent.

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[25] Thus, in Malin's version, he said "get out of here with that shit" (referring to the Concentra paperwork), whereas in Herrera's and Swierczek's version Malin repeated "No Concentra, no Concentra." I find that these are not mutually exclusive, and conclude that he said *both* things.

[26] Thus, Million testified that during a bargaining session attended by Malin in March, Malin smelled of alcohol and appeared inebriated, as was asked to leave, as reflected in the Union's bargaining notes at the time. (Tr. 473−475).

[27] While there is no medical or scientific evidence in the record confirming that Malin was in fact intoxicated, inasmuch he did not submit to testing, no such strict standard of proof is required or needed for reasonable persons to conclude that an individual in their presence is exhibiting clear signs of intoxication—which humans have by now observed for millennia. Indeed, it would have made no sense for Sutton, Cooke, Herrera, Garces, Ellis, and Swierczek to have responded to these events in the manner they did unless they had good reason to believe that Malin was in fact intoxicated. Thus, to the extent that Malin's version of events differs in any significant or material way from that testified to by Herrera, Sutton, Cooke, or Swierczek, I credit their version, since I conclude that Malin's perception and memory of events was likely impaired.

D. The Duties, Responsibilities and Authority of Maintenance Supervisors (MSs)

Much testimony was proffered regarding the duties, responsibilities, and authority (or lack thereof) of MSs, positions that were held, as discussed above, by Rau, Sutton, and Cooke. Below, I will discuss the testimony of the various witnesses with regard to these duties and responsibilities, broken down by categories for purposes of organizational simplicity. Some and perhaps many of the facts are not truly in dispute, as discussed below, and ultimately the meaning or interpretation of these facts is what will be of significance in determining the status of MSs.

1. Scheduling, assignment, and direction of work

These topics produced the greatest amount of testimony by most of the witnesses. This testimony primarily focused on the work, schedules, and assignments of the "tower engineers," since there is limited evidence regarding the scheduling and assignment of duties regarding the mechanical engineers, painters, carpenters and locksmith, who are also part of the engineering/maintenance department.

There is no dispute—or evidence to the contrary—that Assistant Chief Engineer Vern Savage prepares the "weekly schedules," which lists days, shifts and tower location(s) where the tower engineers will be working on a weekly basis.[28] It is also undisputed, based on the testimony of witnesses by both sides, that the tower is normally divided into thirds, with the upper, middle, and lower sections separately assigned to the 3 tower engineers on duty on any given day—and that these engineers, by practice and custom, are typically and regularly assigned to the same section of the tower, based both on their preference and familiarity with their section of the tower.[29] The weekly schedules prepared by Savage are posted on the maintenance department behind a glass enclosure, and are rarely changed or modified, and only Savage (or Chief Engineer Montenegro) can make any such modifications, if any.[30] (Tr. 29; 37; 235-239; 244)

Savage, Rau, and Sutton testified that the daily schedules, which designate which sections of the tower are covered by which engineers on that particular day, as well as what time the lunch breaks are taken, are prepared and posted by either Rau or Sutton, who prepare them on the computer prior to the start of the shift. According to these witnesses, these daily schedules reflect the assignments made on the weekly schedules by Savage, which Rau and

[28] It is not clear who performed this function for Respondent prior to Savage being hired in 2016, although the record suggests that it may have been prior assistant chief engineers or the chief engineers. Sutton testified that he did so until 2012, when Respondent Hilton took over the facility from the prior operator (Planet Hollywood), and shifted that responsibility to managers (Tr. 125).

[29] There are exceptions, as discussed below, but the evidence clearly establishes that this is the norm. Also, the testimony indicates that these assignments normally apply only during the day and swing shifts, since the vast majority of service calls for maintenance or repairs in guest rooms are performed during the day, when guests are typically not in their rooms.

[30] The weekly schedules, as well as the daily schedules discussed below, only pertain to the tower engineers who perform guest room maintenance in the tower. There is no evidence in the record as to who schedules or assigns the work of the mechanical engineers, painters, carpenters or locksmith, who are also part of the bargaining unit.

Sutton usually "copy and paste" directly from the weekly schedules prepared by Savage. Savage is thus the person who decides which engineers are in the "lineup," both on a weekly and daily basis. Oftentimes, however, because of absences resulting from sickness, personal time off (PTO) or some other unexpected events, last-minute changes or modifications need to be made on the daily schedules, and these are manually made by Rau or Sutton, who will make such changes on the actual daily schedule that is posted. Savage, Rau, and Sutton all testified, however, that these changes are made after consultation with Savage, who approves the changes. According to their testimony, moreover, if the change requires finding a replacement for the absent tower engineer, only Savage (or the hotel manager on duty "MOD") is authorized to assign a replacement. If no replacement is available for the absent 3rd engineer, the tower floors are divided equally between the available 2 engineers for service calls, instead of the normal three way partition.[31] (Tr. 37-40; 63-64; 73-74; 95-96; 108; 544-547; 578)

It is undisputed that tower engineers receive instructions or directions to perform repair or maintenance services on a particular guestroom via an automated dispatch system called "Synergy," which routes service calls to them via texts to their radios.[32] In other words, if an engineer is assigned to floors 18 through 35 of the tower, for example, any service calls for rooms within those floors will automatically be routed to that particular engineer by Synergy.[33]

It is undisputed that part of the duty of MSs was to keep the PBX/Synergy system operators appraised of which engineers were assigned to which floors, so that service calls could correctly be routed to the proper engineer depending on the location of the problem. Thus, when last-minute daily schedule changes occurred, MSs would enter the modified correct information into the system through software programs in their computers located in the maintenance office. There were, however, other instances during the course of a typical workday where calls had to be rerouted to other engineers because the original engineer assigned to the floor was unavailable. In that regard, several witnesses testified that occasionally a maintenance or repair job in a guest room was more complicated or troublesome than anticipated, in which case the engineer fixing the problem had to be taken "out of the lineup" (not to receive additional calls) until he could finish the job. Savage testified that during the day shift, the engineer will contact

[31] No evidence was proffered by the General Counsel to refute this testimony, either by testimony or through documents. In this regard, I note both Giovanni and fellow tower engineer Felix Teniente testified that changes to the daily schedule occurred often, and that they had observed Rau or Sutton make changes or modifications to the daily schedule soon (or almost immediately) after learning that someone listed on the schedule was absent or otherwise unavailable. Giovanni and Teniente had no basis of knowing, however, whether Rau or Sutton had consulted with Savage or some other manager before posting a revised schedule, as they testified doing. I thus reject the General Counsel's argument that the testimony of Respondent's witnesses regarding scheduling was "unconvincing," and that therefore I must conclude that Rau and Sutton had the independent authority to change scheduling as needed. As discussed below, lack of credibility alone is insufficient to find supervisory authority—direct and affirmative evidence of such authority is required.

[32] According to Giovanni's testimony, 99.9 percent of the service calls would be done through the Synergy system. On occasion, an email would be sent to the maintenance department, and the MS would hand the engineer the email if the call was on his floors. (Tr.255−256.)

[33] Thus, for example, when a guest calls the front desk because an issue in the room, the calls are routed to the PBX operators, who then route the service request to maintenance or housekeeping, depending on the nature of the problem. If the call is regarding maintenance, the Synergy system automatically routes the service request directly to the engineer assigned to that floor, and provides information regarding the nature of the problem via texts. (Tr. 255.)

the MS to notify him that he will be tied up, and the MS in turn notifies him. He will then notify the front desk so that the Synergy dispatch system will take the engineer off the call list, and automatically routes all calls to the two remaining tower engineers, who now split the tower floors equally between them.[34] During the swing and night shifts, after Savage has gone home, the engineers would contact the front desk directly to be taken off the lineup, but would notify the MS so that he knew what was taking place.[35] Rau testified that he acts as a liaison (or as he called it, a "gateway") between the engineers and the front desk, and when engineers occasionally inform him that they need to be taken out of the lineup because they are tied up in a job, and he will directly contact Synergy through an email, and the engineer gets taken off the call list. He testified however, that this happens very seldom, and had not occurred in months. Giovanni testified that he has been tasked with special projects (in a particular room) that would require some time to complete, and either Rau or Sutton would notify the system that was not in the "lineup" while he completed the project.[36] Giovanni would report back when the job was finished and would be placed back in the lineup. On another occasion he told Rau that he wanted to finish a job involving shower tiles in a room, and wanted to be taken off the lineup. Rau told him to continue to take calls, which were backing up, and finish the tile job later when he had a chance.[37] Tower Engineer Felix Teniente confirmed that the majority of jobs or assignments were dispatched through Synergy, although on occasion he was given a "sticky note" with an assignment. Teniente also testified that on one occasion, in response to a request by Savage for volunteers to work overtime to unload pool deck chairs the following day, he volunteered for this job and was approved by Savage. When he came in the next day to work on his day off, however, Sutton told him instead to work doing pool cleaning.[38] (Tr. 74-75; 108-110; 117; 125; 544-546; 583-585)

Regarding MSs' direction of work performed by tower engineers, Giovanni testified that on one occasion he was assigned to fix bathrooms sinks that were detaching from the wall, and he recommended that wood brackets be installed, because in his opinion the brackets that had been installed were not doing the job. Both Rau and Sutton, who had come to the room to inspect the problem, told Giovanni to tighten up the brackets—because that's the way it was done. Giovanni tightened the brackets as they suggested, but the fix failed anyway. Teniente was called in to install the brackets as Giovanni had suggested, because he had other calls to make. Additionally, Teniente testified that Sutton directed him to 'backwash" the spas every day, which in the past had not been done so with that frequency. Both Savage and Sutton

[34] Savage also testified that on occasion MSs would call the front desk to have someone taken off the lineup.
[35] Normally, Cooke would be on duty until 10 p.m., when his shift ended. Accordingly, there would be no MS on duty from 10 p.m. until 6 a.m., when Rau arrived.
[36] Giovanni testified that either Rau or Sutton would hand him a paper during a pre-shift meeting directing him to such assignment. For example, he was asked to fix a toilet on the 57th floor—which was his assigned area. When he went there, he realized it was not a mechanical problem he could fix, but rather a housekeeping matter involving a scratched toilet that needed to be cleaned—so he did not do the job, and told Rau to refer the matter to housekeeping because he did not have the proper cleaning equipment.
[37] Giovanni testified that another tower engineer who was present but not in the lineup that day, Jose Crespo, could have been assigned in his stead to take calls. The fact that Rau did not replace Giovanni with a substitute who was not scheduled to be in the lineup, however, tends to show that Rau did not have such authority, as Savage indicated in his testimony.
[38] According to Teniente, this was on a Friday, which was Savage's day off. There was no testimony as to whether Sutton consulted with or was directed by Savage to change this assignment. Teniente was one of the engineers certified to perform pool maintenance work.

testified, however, that this directive came from Savage. Finally, regarding the issue of MSs' alleged "direction" of maintenance engineers' work, Savage testified that MSs are not held accountable in any manner for the work performed by maintenance engineers, and that he has never disciplined or otherwise penalized MSs for the performance of maintenance engineers or others in the maintenance department. No evidence to the contrary exists in the record. (Tr. 119; 138-139; 192; 572; 494-495; 519)

There was no additional testimony regarding the scheduling, assignment or direction of work by MSs, and no documentary evidence in that regard, except for the position description for "Supervisor, Maintenance," (Engineering) introduced as General Counsel Exhibit 13. In that regard, the position description, in relevant part, states that the title holder "Supervises, directs and coordinates daily work assignments and specific tasks performed by Maintenance Technicians" (GC Exh. 13(a). Additionally, the position description states that senior maintenance techs and maintenance techs I, II, and III, "report directly" to the title holder (GC Exh. 13(c). Herrera testified that the above-described position description was created in 2006, prior to Respondent's acquisition of the property, and was in effect when Respondent took over the property in 2012. Herrera further testified, however, that she began working on revising the position description soon after she joined Respondent in 2013, in order to reflect the actual reality of what the individuals in these positions were doing and what their duties were. According to Herrera, the revised draft was never released pending the outcome of the collective-bargaining negotiations. Nonetheless, according to Herrera, the portion of the description which stated that the maintenance supervisor "[s]upervises, directs and coordinates daily work assignments and specific tasks performed by Maintenance Technicians" was not in effect, and neither was the language that stated the maintenance technicians reported to the maintenance supervisors, who instead reported directly to the assistant chief engineer. Additional changes were also made in the description of their duties, regarding their responsibilities regarding the pool areas. Herrera also testified that during negotiations the parties discussed changing the MSS title to "lead engineers." (Tr. 356−363). Indeed, as discussed earlier, during negotiations the parties not only agreed that MSs were part of the bargaining unit, they agreed that their titles would be "Lead Engineers," consistent with the titles and responsibilities of those in a sister property (Hilton Paradise) where the maintenance employees were also represented by the Union. (Tr. 468−469.)[39]

2. Leave, personal time off, and overtime

Savage testified that only he and Montenegro had the authority to approve or disapprove leave (vacations), personal time off (PTO), or overtime (OT), and that MSs did not have such authority, testimony which is consistent with the testimony of Rau, Sutton, and Cooke.[40] The record contains little evidence to the contrary regarding leave and PTO, leaving the

[39] Such agreement is reflected in the contract which the Union executed and returned to Respondent in late September or early October (GC Exh. 11), which the parties stipulated would be in effect if Respondent's withdrawal of recognition on September 8 was not valid (Tr. 441−443).

[40] Indeed, Giovanni and Teniente admitted that Savage was the person who approved vacations and PTO (Tr. 283; 340).

approval/disapproval of OT as the only issue truly in dispute.[41] With regard to OT, most of the testimony centered as to what occurred at the end of a tower engineer's shift, if the engineer had not finished the maintenance or repair job he was doing in the guest room when his shift ended. Both Giovanni and Teniente testified that on multiple occasions they informed Rau or Sutton that they were still working on a maintenance matter in a room when their shift came to an end, and asked if they could stay and work OT until they fixed the problem. They testified that on these occasions Rau or Sutton informed them they could stay until they finished the job.[42] Savage, on the other hand, testified that it was standard procedure for tower engineers to finish a job in guest rooms before going home, and that OT was automatically pre- authorized by him in such cases. He indicated that engineers usually notified the MSs to let them know what was going on, but that the engineers did not need to get permission to work OT in those circumstances. Rau testified that OT is automatically pre-authorized is such end-of-shift situations, and that he only gets notified by the tower engineer of the situation, corroborating Savage's testimony. Sutton and Cooke testified that they do not authorize or approve OT, that only Savage or Montenegro can do that (Tr. 31; 104−105; 133; 190−192; 495−497; 573−577).

In view of the above, I credit the testimony of Savage, not only because it was corroborated by Rau, Sutton, and Cooke, but because I find that the evidence presented by the General Counsel's witnesses was circumstantial at best—and was not sufficient to rebut the direct testimony that such OT was preauthorized.

3. Discipline

Savage testified that MSs have no authority to discipline employees, testimony which was corroborated by the testimony of Rau and Sutton. No documentary evidence of any type, in the form of disciplinary warnings, memos, emails or other types of written communications, exist in the record that would indicate that MSs have the authority to discipline employees—or even recommend such discipline.[43] While Savage testified that MSs act as his "eyes and ears" and have a duty to report problems to him, he testified that he would not undertake any disciplinary action based on any reports by MSs, but would investigate the reported problem and

[41] Regarding PTO, Giovanni testified that on one occasion he presented a PTO slip to Sutton, who signed the slip turning down Giovanni's request (Tr. 187−188). Savage testified, however, that it was his decision to decline Giovanni's request, and that he instructed Sutton to sign off on the slip turning down the request (Tr. 517−518).

[42] Giovanni also testified that since 2015 Cooke had "approved" OT on about 20 occasions, but it is not clear whether this was and the end of a shift as described above, although it presumably was. He admitted, however, that he had no way of knowing whether Savage or Montenegro had approved such OT before Cooke (or Rau or Sutton) told him he could stay and work the OT. (Tr. 272−274). On another occasion, Giovanni requested to work an extra shift, but Sutton turned him down, informing him that someone else was already assigned (Tr. 227). I conclude Sutton's reply does not signal any authority on his part

[43] Indeed, the only disciplinary action in the record is one prepared and signed by Savage, which he issued to Teniente for failing to properly maintain the spas, a decision made by Savage after he noticed Teniente had not properly filled out maintenance logs that he examined (GC Exh. 2). Although Sutton testified that he had reported the problem to Savage, there is no evidence that he recommended any disciplinary action (Tr. 118−119; 494−495; 589). The General Counsel argues, in essence, that Savage's testimony is not credible, and that therefore Savage "must" have made his decision based strictly on Sutton's "recommendation" (of which there is no evidence). I found Savage's testimony in this regard credible, and not contradicted by any other evidence. Moreover, as discussed below, the party asserting supervisory status cannot rely on negative credibility findings alone to establish supervisory status—affirmative evidence of some type must be presented showing supervisory authority, evidence which can in turn be augmented or enhanced by credibility findings.

interview any employees involved before taking any disciplinary action. No reliable or credible evidence to the contrary exists in the record (Tr. 60; 64; 118−119; 493−494; 572).[44] Accordingly, based on the record evidence, I conclude that MSs had no authority to discipline or recommend such.

4. Work performed by MSs, their wages and uniforms

Rau and Sutton testified that they spend about 70 percent of their time doing "hands-on" work, that is, working with tools and performing maintenance duties, either on their own or providing support or assistance to other maintenance engineers with work in guest rooms, and sometimes relieving them so that they can go on to perform other jobs.[45] Giovanni and Teniente confirmed that MSs often perform maintenance work, sometimes by their side. About 30 percent of MSs' time is spent in the maintenance office which the three MS share, working on their computers, which other maintenance employees have access to for internet or emails.[46] Each MS is assigned his own desk and computer in the office, photographs of which were introduced in the record.[47] (Tr. 85−86; 116; 565; 591−595.)

Sutton testified that he makes daily rounds as part of his work to make sure things get done correctly, and if there is a problem he either fixes the problem himself or reports it to Savage so he can decide what to do. MSs are part of and included the weekly schedules prepared by Savage, and work hourly schedules just as other maintenance employees. They are subject to the same attendance rules and policies as other maintenance department employees. They can occasionally work outside that hourly schedule, but only with Savage's approval, and must submit leave slips to him like other maintenance employees do (Tr. 37; 70−71; 106−107; 514; 573; 576.)

Savage testified that MSs are hourly employees who are not the highest earning engineers in the department, and they receive the same benefits as others in the maintenance department. (Tr. 513−515.) There is no evidence to the contrary with regard to uniforms, it is undisputed that MSs wear polo shirts with khaki pants, whereas maintenance engineers wear grey/blue long-sleeved shirts and cargo pants. All wear nametags bearing their names and their hometowns, without titles or positions.

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[44] Giovanni testified that Rau and Sutton had "written him up" to Savage, but did not provide any specific examples, and as indicated above the record is devoid of any such documentary evidence (Tr. 180−181; 275−279). I therefore give this testimony little weight. Giovanni also testified that Sutton had once reported him to Greg Collin, a prior chief engineer, but admitted that Collin interviewed him about the problem before undertaking any action, resulting in a "counseling," not disciplinary action. (Tr. 180−182.)

[45] Rau testified that his specialty is electrical work, and also works on problems with the electronic equipment such as audio/video equipment in guest rooms, and Sutton testified that his specialty is plumbing work. Rau is also the locksmith on duty when the locksmith is not scheduled to work, and hence has the keys to the locksmith room.

[46] The computers are also used for ordering parts, as discussed below, to notify the housekeeping department or PBX operators of scheduling changes, and by the mechanical engineers to control the mechanical machinery such as heating and air conditioning systems.

[47] R. Exh. 7 (a)-(f); Tr. 497−502. As shown in the photographs, the offices are not fully enclosed, as the walls do not go all the way to the ceiling, and are thus not completely private. It should be noted that other employees in the maintenance department also have their own shops or offices, including desks, such as the mechanical engineers, locksmith, carpenters, and painters (R. Exh. 7; Tr. 340; 350; 505−507; 509−510).

5. Vendors and parts/supplies

Savage testified that MSs are authorized to call outside vendors, such as pool heater specialists, when they encounter a problem that the maintenance department engineers cannot fix, or is beyond their capability. Respondent uses regular outside vendors for these purposes, and MSs can call them to schedule the vendor to visit and examine the problem and to provide a pricing quote or estimate for the job (or the parts).[48] According to Savage, however, MSs do not have the authority to authorize the vendor to proceed with the work and incur the expense, which only Savage or Montenegro can approve. MSs Rau or Sutton will escort the vendor while they are on the premises and keep Savage (or Montenegro) informed about their visit. Moreover, the record indicates that MSs are not the only maintenance department employees who call vendors to obtain price quotes and estimates. Additional undisputed testimony indicated that mechanical engineers Longoria and Abad often deal directly with outside vendors for the AC/S systems, and Locksmith Crespo, Carpenter Szafranski, and the painters deal directly with the outside vendors in their respective areas or responsibilities, to obtain price quotes (Tr. 41; 111−115;491−492; 566−567). I credit the above testimony, which as described above was essentially undisputed. There is simply no direct or affirmative evidence that MSs have the authority to engage the services of an outside vendor and incur a charge without the express approval of Savage or Montenegro.[49]

With regard to ordering parts and supplies, the evidence shows that Respondent uses procurement software called "Birch Street" for the ordering of parts and supplies. MSs are tasked with entering orders for parts and supplies, typically handwritten by maintenance engineers or other maintenance employees on a clipboard, into the procurement software, but do not actually authorize the purchases. Purchases are authorized, or finalized, by Assistant General Manager Ellis, or Savage and then Ellis, or Montenegro and then Ellis, depending on the purchase amount. Thus, orders for less than $1500 are approved solely by Ellis; orders from $1500 to $2500 must be approved by both Savage and then Ellis; and orders above $2500 must be approved by both Montenegro and then Ellis. There is no evidence that MSs can authorize the purchase of any parts or supplies, regardless of the amount (Tr. 62−63; 83−84; 125; 293−294; 504−505; 531−532).

[48] Only MSs Rau and Sutton deal in this manner with outside vendors—there is no evidence that Cooke has any such involvement.

[49] The only evidence proffered by the General Counsel with respect to this issue was testimony by Teniente, who testified that on one occasion in March 2018 he heard Rau call an outside vendor about a problem with the pool heater, and that the vendor showed up 3−4 hours later to take a look at the problem. Teniente admitted he did not know what had occurred between the time Rau made the initial call and the time the vendor showed up, or what happened thereafter. He also testified that on other occasions he has overheard MSs contact vendors on the phone from the office. (Tr. 315−316; 345.) This testimony in no way contradicts the testimony of Savage and others as described above. The General Counsel, in his post hearing brief, appears to recognize the inherent weakness of this factual scenario as related to his arguments regarding supervisory status, so instead he appears to argue that the mere ability of MSs to ask vendors to come and inspect faulty equipment conveys supervisory authority. As discussed below, this is a flawed view of 2(11) supervisory authority.

6. Meetings and training

The evidence shows that pre-shift meeting are typically held at the beginning of the shift and are typically by MSs Rau or Sutton, although occasionally Savage or Cooke will conduct it. These are fairly informal meetings that last about 5 minutes, and where daily reports or emails from the front desk are read to the maintenance crew. The daily reports typically contain information about what is going on at the facility, including occupancy rates, guest survey results, VIPs visiting, and occasionally report on a problem or issue that may have occurred on the previous shift. Typically, neither policies or expectations are discussed at these meetings, and on those occasions when the MSs conduct these meetings, their role is limited to reading the daily reports. MSs do not attend management meetings (Tr. 44−46; 84; 115−116; 513).

With regard to training, the evidence shows that mandatory compliance training is held once a month in the carpenter shop, training which is almost always conducted by Savage, who distributes and keeps an attendance sheet. During these meetings, handouts are distributed and read aloud, sometimes by an MSs or an engineer as directed by Savage. Engineers who have been designated as trainers ("train the trainers") also conduct training of other engineers. Additionally, although perhaps it may not be labeled as "training" in a formal sense, the evidence indicates that engineers routinely suggest to each other how to do certain things, or how to do it in a better way, based on their experience (Tr. 200−201; 287; 511−513; 338; 347; 576).

IV. Discussion and Analysis

A. The Request by Giovanni for Union Representation

Pursuant to the well-established doctrine first approved by the Supreme Court in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), employees represented by labor organizations have the right to union representation during meetings employees reasonably believe could result in, or lead to, discipline. In the ensuing years since *Weingarten* issued, the doctrine has been refined by the Board and the courts in response to different factual scenarios that ensued. It is well established, for example, that in order to be entitled to union representation under *Weingarten*, supra, two criteria must be met: First, the interview in question must be an investigatory interview which the employee reasonable believes could result in discipline. Second, the employee must request union representation. *Lennox Industries*, 244 NLRB 607 (1979); *Baton Rouge Water Works Co.*, 246 NLRB 995 (1979); *Kohl's Food Co.*, 249 NLRB 75 (1980). Additionally, it is well-established that employees are not entitled to representation if the purpose of the meeting is only to inform the employee of the disciplinary action already decided. *Baton Rouge*, supra. If the meeting is investigatory in nature, however, and the employee requests union representation, the employer must either discontinue the interview or offer the employee the choice of continuing without representation or having no interview at all—with the risk that the employer might lawfully impose discipline based on information gathered from other sources. *Ralphs Grocery Co.*, 361 NLRB 80, 86 (2014).

A discussed above, I have found that in early or mid-January (2017), Savage summoned Giovanni to his office after he observed Giovanni using the hotel's guest elevator while on duty, in apparent violation of Respondent's policy. Giovanni, I found, had noticed Savage observing

him as he emerged from the guest elevator, and thus reasonably suspected when he was summoned by Savage that disciplinary action was a distinct possibility. I further found that when Giovanni walked into Savage's office, Savage handed him a piece of paper and told him to write down why he felt he shod be able to ride in the guest elevators. At that point, Giovanni responded "no," and invoked his *Weingarten* rights. Crediting Giovanni, I found that Savage nonetheless persisted, telling Giovanni that he had photographic (or video) evidence of his misdeed, and insisted that Giovanni explain his conduct in writing. After about 10 minutes of this, Giovanni told Savage that he would write the statement at some later point, since he was busy, and walked out of Savage's office.

In these circumstances, I conclude that Respondent failed to respect or abide by Giovanni's lawful request for union representation, in violation of Section 8(a)(1) of the Act. By telling Giovanni, after he had requested representation, that there was photographic evidence of his misconduct, Savage was in effect eliciting a response from Giovanni, and was thus continuing an interview that should have been stopped when Giovanni invoked his rights under *Weingarten*. Indeed, Savage continued to press Giovanni for a written statement, long after Giovanni had said no and requested representation. The fact that Giovanni refused to cooperate, and eventually walked out of the meeting without providing any information or producing the repeatedly requested statement, does not diminish or negate the violation in these circumstances, in my view. Had Savage told Giovanni, immediately after he asked for representation, that he could leave and turn in the statement later, would have resulted in a different verdict, since this would have in effect allowed Giovanni to seek the assistance of the Union before writing and submitting the statement. This is not what occurred, however. The violation here lies in Savage continuing to press Giovanni for information after Giovanni invoked *Weingarten*, and the fact that he nonetheless failed to extract any information from Giovanni is legally irrelevant.

Accordingly, and for the above reasons, I conclude that Respondent violated Section 8(a)(1) of the Act by the above-described conduct, as alleged in paragraphs 5(a), (b), (c), and 7 of the complaint.

B. The Alleged Denial of Malin's Weingarten Rights, and His Suspension and Termination

Briefly summarizing the facts as discussed above, on February 17, MSs Sutton and Cooke reported to security officials and management that they believed Malin was exhibiting signs of alcohol intoxication at work. Cooke, who was the MS on duty at the time (Sutton had just left work), was directed to call Malin to the security office, where a meeting was planned with security and management officials. When Malin arrived, he immediately informed Cooke and security officer Swierczek that they should know better than call an "impromptu" meeting without a union representative present, and then left. A short while later Cooke reached Malin by radio and again asked him to come to the security office, and Malin again refused, for the same reason (the lack of a union representative present). Malin then went to speak to a fellow engineer Bumpus on the 23rd floor about an incident involving the latter, which had prompted a visit by Union Agent Million to the facility that very afternoon. When Malin went to board the elevator on the 23rd floor to head back to work, he was confronted in the elevator by Herrera, Ellis, Swierczek, Garces, and Cooke, with Herrera noticeably holding papers in her hands that said "Concentra," the employer's alcohol & drug testing facility. Malin immediately said he

wanted no part of "that shit," and said "no Concentra, no Concentra," and said he wanted union representation. He also said "fuck you" to Herrera repeatedly while waiving a finger in her face, and said "fuck you" to Ellis when he admonished Malin not to speak to Herrera in such manner. Herrera offered to get Bumpus to act as a witness, and warned Malin that he could be suspended if he refused to cooperate with the testing. By the time the elevator reached the bottom floor, Herrera informed Malin that he was suspended pending further investigation. He was discharged about a month later, on March 22.

Based on the above scenario, more thoroughly discussed and detailed in the Facts section, the General Counsel alleges that Respondent violated Section 8(a)(3) and (1) of the Act by denying Malin the right to have a union representative assist him prior to submitting to an alcohol/drug test, and by suspending and ultimately discharging him for refusing to participate in such testing without union representation. The General Counsel primarily relies on *Manhattan Beer Distributors, LLC*, 362 NLRB No. 192 (2015); and *Ralph's Grocery Co.*, 361 NLRB 80 (2014), and cases cited therein, in support of its allegations. There are, however, some subtle but significant differences between the facts in the present case and what occurred in the two cited cases. First, in both *Manhattan Beer Distributors* and *Ralphs*, very little time elapsed between the time the employee arrived at the disciplinary meeting, the time he asked for union representation, and the time the employee was suspended or discharged for refusing to participate in drug/alcohol testing in the absence of a union representative's presence. In both cases, the employee was given little or no opportunity to obtain representation before the employer imposed discipline for the employee's refusal to participate in the testing. In the present case, Malin was on notice from the moment he first arrived at the security office that an investigatory meeting that could result in discipline was about to occur. Indeed, he immediately told those present at the time (Cooke and Swierczek) that *they* should know better than call such meeting without having a union representative. This statement, of course, incorrectly assumes that it is somehow the employer's obligation to *obtain* union representation for the employee—as will be discussed below. Malin then walked out and went back to work. A while later (the amount of time that elapsed is not clear), he was called via radio and again asked to come back to the office, which Malin refused to do because no union representative was present. It is clear in these circumstances that Malin knew from the start that possible discipline was afoot, yet he undertook no effort whatsoever to attempt to contact a union representative.[50]

The General Counsel implies in its brief that it was Respondent's obligation or duty to contact the Union and arrange for Malin to have representation in these circumstances.[51] I have found no authority for such bold assertion, and the General Counsel cites none; it is simply not the law under *Weingarten*. As discussed in the opening paragraph of the analysis section, it is well-established that it is incumbent on the employee to request union representation when faced with an investigatory interview that might result in discipline. Once the employee has asked for such representation, the employer's obligation, if it wishes to continue with such interview, is to

[50] Malin admitted in his testimony that he knew Union Representative Kevin Million was visiting the facility that afternoon, yet there is no evidence that he attempted to each Million or any other union representative that afternoon. As discussed earlier, the Union had never appointed a shop steward in the facility, nor informed the Employer that any given bargaining unit employee was authorized to act as one, perhaps because no collective-bargaining agreement was yet in place.

[51] Thus, on p. 80 of its post-hearing brief, GC states: "Why Respondent did not contact Million, who was at the property roughly half hour before is unknown."

provide the employee with a reasonable *opportunity* to obtain such representation, that is, a reasonable amount of time given the particular circumstances for the employee to secure such representation. The employer may not stand in the way or otherwise impede or interfere with an employee's efforts to obtain representation. *Montgomery Ward & Co.*, 254 NLRB 826, 830 (1981), enfd. in part 664 F.2d 1095 (1981); *Southwestern Bell Telephone Co.*, 227 NLRB 1223 (1977). Such is the extent of the employer's obligation under *Weingarten*, however; nothing more. It has no affirmative obligation to notify an employee that he/she has a right to union representation, or to try to obtain or secure representation for the employee (absent highly unusual circumstances), or even to try ascertain if a union representative is available. Such responsibility falls squarely on the employee who wants union representation.[52]

In this case, Malin made no attempt to contact the Union between the time he was first asked to come to the security office and the time the incident in the elevator occurred sometime later, even though he knew possible disciplinary action was afoot. Based on his comments, it appears, as mentioned above, that he incorrectly assumed it was Respondent's obligation to obtain union representation for him from the start, and that he had no obligation to show up, cooperate, or ask for the chance to obtain such representation. Although it may be reasonable to assume that Malin did not specifically know that he was going to be asked to undergo an alcohol/drug test until he was confronted in the elevator, he had more than adequate notice that a disciplinary meeting of some type was in the works. Had he attempted to obtain representation given such ample notice, a different scenario could have likely played out at the elevator. Thus, when entering the elevator and noticing that Herrera has the "Concentra" paperwork, Malin might have informed them that he had contacted the Union and that a representative (perhaps Million himself) was on the way, or that he had been unable to reach the union and wanted some additional time for consultation. While it is impossible to say what the response by Herrera and the others to such request may have been, it is not unreasonable to fathom that a completely different result might have ensued.

This brings us to the second distinction between this case and the situation in *Manhattan Beer Distributors* and *Ralphs*. From the outset of the encounter at the elevator, and consistent with his behavior earlier, Malin displayed a belligerent, vulgar and disrespectful attitude, beginning with his comment about getting "out of here with that shit" (Malin's own words), referring to the Concentra paperwork, followed by "No Concentra, no Concentra," followed by a volley of "fuck you" hurled at Herrera and then Ellis. This belligerence was largely fueled, I conclude, by the alcohol intoxication that was obvious to those in the elevator, who ultimately needed no medical or scientific confirmation of what was readily apparent. It is reasonable to conclude that from the outset Malin was not going to agree to undergo any testing, regardless of what a Union representative might counsel. Additionally, unlike in *Manhattan Beer Distributors* and *Ralphs*, although Herrera warned Malin that he could be suspended for refusing to undergo testing, she never told Malin that the reason he was suspended was his refusal to undergo testing.

[52] In *Spartan Stores, Inc.*, 235 NLRB 522 (1977), enf. denied 628 F.2d 953 (6th Cir. 1980), the Board implies that a limited exception may exist in situations where there has been a firmly established practice by the employer to summon the (in-house) shop steward, for example. The Board has never ruled that this exception is applicable, however, and in any event there is no evidence that this practice existed in Respondent's facility. While the record indicates that Respondent allowed employees to call or use another employee as a witness in disciplinary interviews, an employee witness is not the same as a bona fide *Weingarten* representative—and in any event, Herrera offered Malin to have fellow employee Bumpus as a witness if he wished, an offer he ignored.

Rather, the decision to suspend came at the end of an elevator ride during which Malin displayed conduct which was not only consistent with intoxication, but which even more importantly, was belligerent, vulgar, and highly disrespectful of the managers present—particularly Herrera and Ellis.[53] I found Herrera credible when she testified that Malin's overall conduct that day was the reason for his discipline, and there is no documentation to the contrary.[54] In these particular circumstances, I conclude that the Board's rationale in *Manhattan Beer Distributors* that the employee's discharge was "inextricably linked to his assertion of *Weingarten* rights" is not applicable, because the nexus here is simply not clear—and cannot be presumed. To find otherwise would equate invoking *Weingarten* to a magical incantation which instantly and automatically creates the presumption that any discipline that follows is due to its invocation, while simultaneously neutralizing and absolving any offending conduct engaged in by the employee. I do not believe the Supreme Court ever envisioned, let alone intended, that *Weingarten* would have such magical properties.

A third distinction in this case is that in cases of suspected alcohol intoxication time is truly of the essence, as the Board recognized in *Manhattan Beer Distributors*.[55] Unlike marijuana and other drugs, traces of which can be detected in the body days and even weeks after consumption, alcohol is quickly metabolized in the body, and a prolonged delay in testing will render such test useless. In this case, suspicion of Malin's intoxication was first aroused at the pre-shift meeting at 3 p.m., when MSs Sutton and Cooke noticed his odd behavior. This set off a chain of events while management mobilized its resources, and Malin was finally called for a meeting around 4:00 p.m.—a meeting that Malin rejected outright because no union representative was present, as described above. More time passed before the fateful confrontation in the elevator, perhaps another 30 minutes later. While some of the delay can be attributed to Respondent's efforts in gathering its resources, the undisputable scientific and medical fact remains that any further delay would have nullified the effectiveness of any test.[56]

A final but crucial distinction between this case and the situation in *Manhattan Beer Distributors* and *Ralphs* is that in the present case Malin participated in a *Weingarten*-type interview with union representation a few days after he was initially suspended. Thus, on February 22, 5 days after the events described above, Malin and his union representative, Million, met with Respondent's HR director, Owens, and they proceeded to have a full-fledged interview during which Malin was allowed to give his version of what had occurred on February 17, and during which a video of the events in the elevator was reviewed. Malin was terminated 1 month later, on March 22, following this interview. Thus, even assuming that Malin's initial suspension was somehow "tainted" by the alleged denial of his right to representation on February 17, it simply cannot be assumed that Respondent's decision to discharge Malin a month after his meeting with Owens and Million was due to his refusal to undergo testing without union representation. This is particularly true in light of my crediting the testimony of Herrera, who testified that Malin's over-all conduct that day was the basis for his termination. Moreover, I

[53] This conduct continued thereafter, when Malin returned his keys and radio to the security office and told them to stick them up their ass.

[54] Thus, no suspension letter (or termination letter, as discussed below) was introduced in the record, unlike in *Manhattan Beer Distributors*.

[55] Id., 362 NLRB No. 192, slip op. at 3 fn. 9 (2015).

[56] As discussed above, there was no shop steward in the facility, and by this time Union Agent Million, who had been in the facility earlier, was apparently no longer around.

note, again assuming that the initial suspension of Malin was tainted because of its nexus to a *Weingarten* violation, that the General Counsel still bears the burden of proof to establish that Malin's eventual discharge more than a month later was due to such direct nexus. Thus, it would be the General Counsel's burden to establish, for example, that the tainted suspension was a pre-requisite disciplinary step absent which a discharge would not have occurred, such as by establishing that Respondent had a strict progressive disciplinary system. No such evidence was adduced.[57] I find that Herrera's credited testimony establishes that Malin was terminated for his over-all conduct on February 17, conduct which undoubtedly offensive and disrespectful.

In light of the above, I conclude that Malin was not unlawfully denied his right to union representation on February 17, and that neither his suspension on that date nor his subsequent discharge on March 22 was unlawful. Accordingly, I find no merit in the allegations contained paragraphs 5(d), 5(h), 7 (as it pertains to paragraphs 5(d) and (h)), and 8 of the complaint, and recommend that they be dismissed.

C. The Supervisory Status of MSs and Lawfulness of Respondent's Withdrawal of Recognition

It is undisputed that Respondent withdrew recognition from the Union on September 8 2017, based on a petition signed by 13 individuals out of 24 in the bargaining unit. Three of the individuals who signed the petition, however, were MSs Rau, Sutton and Cooke, whom the General Counsel alleges are statutory supervisors. If so, their signatures would be invalid, and thus the petition would only contain 10 valid signatures in a now reduced unit consisting of 21 employees, which is less than a majority. Respondent's withdrawal of recognition from the Union in such circumstances would violate Section 8(a)(5) & (1) of the Act and be invalid, according to the General Counsel. Hence, the lawfulness of Respondent's withdrawal of recognition hinges around the question of whether MSs Rau, Sutton, and Cooke were 2(11) supervisors at the time they signed the petition.

1. The 2(11) supervisory status of MSs Rau, Sutton, and Cooke

Section 2(11) of the Act defines a "supervisor" as: "any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection to the forgoing the exercise of such authority is not merely routine or clerical in nature, but requires the use of independent judgment." In order to find an individual to be a supervisor pursuant to this definition, the Board requires that such individual must meet the following criteria:

1. Hold or exercise authority to engage in at least one of the 12 supervisory functions listed above;

[57] In that regard, I do not believe that a *Wright Line* analysis is the proper analytical framework in this situation, because animus—an indispensable element in that analysis—is missing, and animus cannot be presumed in these circumstances. Denial of a *Weingarten* request may signal impatience, lack of familiarity with the law, or as here, recognition that time was of the essence because evidence of alcohol intoxication disappears from the body in quick fashion—but it cannot automatically signal union animus. To conclude otherwise would truly transform *Weingarten* into a magical incantation, an all-encompassing and self- bootstrapping evidentiary marvel.

2. Their exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment; and
3. Their authority is held in the interest of the employer.

Oakwood Healthcare, Inc., 348 NLRB 686, 689 (2006), citing *Kentucky River Community Healthcare*, 532 U.S. 706, 713 (2001). It is well-established that the party alleging2(11) supervisory status bears the burden of proving such status, and any lack of evidence on an element necessary to establish such status, or inconclusive or conflicting evidence in that regard, will be held against such party. *G4S Regulated Security Resolutions*, 362 NLRB No. 134, slip op. at 1−2 (2015), and cases cited therein. Moreover, mere inferences or conclusory statements, without detailed, specific evidence, are insufficient to establish supervisory authority, as are job descriptions, job titles and similar "paper authority," without more. *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006); *Lynwood Manor*, 350 NLRB 489, 490 (2007); *Lucky Cab Co.*, 360 NLRB 271, 272 (2014).

From the outset, I note that with regard to the 12 supervisory functions defined by the statute, there is simply no evidence in the record that the 3 alleged supervisors perform most of these functions. Thus, there is no scintilla of evidence that the three MSs have anything to do with the hiring, transferring, suspension, lay off, recall, promotion, discharge, or reward of employees in any way, so there is no need to discuss these functions. Arguably, there is some evidence regarding their authority to discipline, assign, and responsibly direct employees, so I will discuss the evidence with regard to these 3 functions.

I will start by discussing discipline, because this function is the simplest one to dispose of in light of the record. Quite simply, the evidence introduced by the General Counsel with regard to the MSs' authority to discipline is extremely weak and deficient, and thus inherently insufficient to even meet a threshold conducive to further inquiry. For example, there is no affirmative, direct or specific evidence in the record that any of the three MSs disciplined any employee or effectively recommended such discipline. Indeed, the only disciplinary actions contained in the record, one issued to Giovanni and the other issued to Teniente, were both generated, written, and signed by Savage. There is simply no evidence at all that any of the MSs were in any way involved with the Giovanni discipline, and General Counsel does not even assert that there is. Regarding the discipline of Teniente for his failure to properly maintain the spas (GC Exh. 2), a disciplinary action issued by Savage, I credited the testimony of Savage that he investigated Teniente's conduct and decided on his own, without input from Sutton, to issue the discipline.[58] The fact that Sutton may have reported Teniente's conduct to Savage, as he testified he did, does not make a supervisor, since Savage made his decision based on the results of his own investigation. See, e.g., *Willamette Industries, Inc.*, 336 NLRB 743, 744 (2001).[59]

[58] I credited Savage's testimony to the effect that even though MSs are his "eyes and ears" and are supposed to report problems to him, he always conducts his own independent investigation of any reported problems or conduct by the employees in the maintenance department, and decides what to do on the basis of on his own investigation (Tr. 60).

[59] General Counsel (GC) in essence argues that Savage's and Sutton's testimony should not be credited or believed, and that therefore Sutton "must have" effectively recommended Teniente's discipline. This type or argument, made by the GC not only in this instance but in other areas in dispute regarding the MSs' supervisory status, betrays the essential weakness of the GC's case. The party alleging supervisory status has the burden to prove such status, and cannot rely on negative inferences or isolated credibility resolutions alone to meet the evidentiary threshold

The only other semblance of evidence of any type regarding discipline, was Giovanni's testimony that Rau and Sutton had "written him up" to Savage, whatever that means. I specifically discredited this testimony not only because Giovanni provided no specific examples, but because no other corroborating evidence of any such actions were introduced in the record. Accordingly, in light of the lack of credible, direct or affirmative evidence that the MSs has the authority to discipline employees or effectively recommend such discipline, I conclude that they had no such authority.

I now turn to the other 2 remaining functions of Section 2(11) supervisory authority, "assign" and "responsibly direct," which much of the testimony and other evidence was directed at. A fair amount of this evidence and testimony was addressed at the manner in which tower engineers are scheduled to work, to perform specific jobs, or to work overtime on in specific locations. As described in the Facts section, Savage prepares a weekly schedule designating what shifts and at which locations the tower engineers will be working each week, including their lunch breaks. As earlier described, tower assignments are typically divided into 3 sections by floors, with the upper, middle and lower tiers assigned to a different tower engineer. These assignments are made by Savage in his weekly schedule, although for the most part, the floor assignments are usually made in accordance to custom, since the tower engineers prefer to work in the areas they are most familiar with. This means that about 70 percent of the time a tower engineer is assigned to his preferred tier of the tower. It is also undisputed that Rau and Sutton, the 2 MSs that work during the day shift, prepare the "daily schedules" that designate where (that is, which tier of the tower) these engineers will be working each particular day. Savage, Rau and Sutton all testified, and I concluded, based on their credited testimony, that the daily schedules are strictly based on the weekly schedules prepared by Savage, essentially "cutting and pasting" the weekly schedules into each daily schedule.

The evidence shows there are times when an engineer slotted to work on a given shift is not available because of illness, personal time off or some other unexpected problem. In those instances, last-minute adjustments are made by Rau or Sutton in the daily schedule, but at the direction of Savage or the hotel manager on duty ("MOD") at the time, according to their credited testimony.[60] Even if a change had to be made without consulting with Savage or MOD, however, the evidence indicates that in such instances, in the absence of an engineer, the tower would automatically be divided into 2 tiers rather than 3, so that the 2 remaining engineers on

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necessary to affirmatively establish such status by the preponderance of the evidence. Rather, as discussed above, specific, affirmative and direct evidence is needed, whether in the form of documents or other corroborative testimony that will support the conclusion that an individual possesses supervisory authority. In that regard I note that in most instances, there usually is some type of "paper trail," be in the form of disciplinary warnings or notations, memos, emails, management or supervisory charts, or other forms of written communications that will reveal, illustrate or least point to supervisory authority. The absence of such direct or corroborative evidence in this case, despite the GC's broad subpoena authority, is telling.

[60] The GC again attacked the credibility of this testimony, essentially asserting that this "cannot be," because its witnesses testified that they had seen Rau or Sutton making manual adjustments or changes to the daily schedule immediately or shortly after learning that a scheduled engineer was not coming to work. But Savage credibly testified that in most occasions when this happened, he had directed Rau or Sutton to make the change, with no evidence to the contrary. Moreover, as discussed below, even assuming that Rau or Sutton made the change without consultation with Savage, such change was of a preordained or routine nature that does not reflect supervisory authority.

duty would have responsibility for half of the tower floors each.[61] The General Counsel argues that by dividing the tower into two in such instances, Rau or Sutton were effectively increasing the workload of the two remaining engineers, and that such ability to "assign" significant additional work represents evidence of 2(11) supervisory authority. This is a spurious argument. First, such practice had long been the established procedure in such situations, so it was not a "decision" that Rau or Sutton had to make—little if any "judgment" was called for. More importantly, even assuming that some decision-making was actually called for, no *independent judgment* was being exercised, as required by Section 2(11), as this was the routine procedure and natural consequence of an unexpected absence. The tower was divided into three tiers; if one of the engineers was missing, it was automatically divided in two, plain and simple. The same holds true for those instances when an engineer in a given tower section was presented with a problem in one of his assigned rooms that required additional time and effort to fix the problem. In those instances, the evidence shows that the engineer would notify either Savage or the MS that he needed to be taken out of the "lineup" until he could fix the problem. Either Savage or the MS would notify the front desk or PBX operator so that the automated dispatch system called "Synergy" would direct all service calls to the remaining two tower engineers.[62] The MSs' involvement is such procedure would likewise not involve the use of discretion, let alone independent judgment. Indeed, in a sense, it is the engineer who in that instance makes the independent assessment that he needs to stay in a given room to finish fixing a problem, and notifies the MS to be taken out of the "lineup." Likewise, although the evidence indicated that on occasion, either Rau or Sutton would hand a tower engineer a piece of paper (usually an email or "sticky note") directing him to fix a certain problem in a certain room, such directive was automatic and routine in nature.[63] Thus, if the problem was on a room on the 48th floor, for example, the "assignment" was directed at whichever engineer was assigned to that floor—and floor assignments were made by Savage in his weekly schedules. Accordingly, neither Rau nor Sutton was exercising any kind of judgment, let alone *independent* judgment, in those situations.[64] In that regard, I note that the Board has concluded that in order to exercise independent judgment, an individual must act "free of the control of others," which means having a significant degree of discretion that rises above the routine or clerical. *Oakwood Healthcare*, supra, at 693. The record simply fails to show that the MSs had such a degree of discretion in handling these routine assignments.

[61] There is no simply direct or affirmative evidence, for example, that Rau or Sutton could, or had the authority to, schedule an engineer not on the "lineup," such as a mechanical engineer or another tower engineer who was off-duty, to fill the slot of the missing tower engineer.

[62] This was the procedure during the day shift. During the swing or night shift, the engineer would call the front desk himself.

[63] The record shows these types of manual "assignments" were not very common, as 99 percent of the service calls were automatically routed through Synergy.

[64] The General Counsel argues that Rau and Sutton admitted that they assign work to the painters, carpenters, locksmiths, and other maintenance department employees such as mechanical engineers when they receive service calls requiring work in the special fields, and that such capacity to assign them these tasks point to supervisory authority. This argument lacks merit. As both Rau and Sutton testified, these are "common sense," routine assignments dictated by the type of work needed—if painting is needed, they assign the service call to the painter, or if carpentry is needed, to the carpenter, etc. No independent judgment is needed to route this common sense, routine assignments that are actually dictated by the type of work needed. These employees are tasked with performing such shores in their specialties by Savage, and the Rau and Sutton simply direct them to where the work is needed to be performed. There is simply no evidence that Rau or Sutton had any degree of discretion in handing these assignments to these specialized employees.

A similar automatic procedure was in place for over time (OT) work when an engineer encountered a problem that could not be fixed by the time his shift ended. Savage credibly testified that engineers were automatically authorized in such instances to stay and work past the end of the scheduled shift in order to fix the problem in the room they were working in. Although in many, and perhaps most instances, the engineer would notify the MS to let him know what was happening, such notification was not to seek "permission" or "authorization" from the MS to work OT, since that authorization was automatically granted by Savage.[65] Indeed, as discussed in the facts section, there is no evidence that MSs had the authority to assign, grant or authorize OT in any situation—only Savage, Montenegro, or the MOD had such authority.

In sum, the record is simply devoid of any direct, affirmative, or persuasive evidence that MSs possess the authority to assign employees work, or that in the possible few instances where they have "assigned" such work, that they have used independent judgment in deciding such assignments.

I turn to the final remaining statutory function required by Section 2(11), the authority to "responsibly direct" the work of employees, using independent judgment in the interest of the employer. Most of the evidence proffered by the General Counsel revolved around a few instances where either Rau or Sutton (or both) instructed an engineer to do a task in a particular manner, or in a particular order. For example, as discussed in the facts section, Giovanni testified that Rau and Sutton directed him to tighten the existing brackets holding up a bathroom sink in a particular room, rather that installing new (wood) brackets, which Giovanni believed would work better. It is not clear whether such "directive" originated with Rau and Sutton or came from above (i.e., Savage), or whether it was based on their technical knowledge and experience as engineers rather than the authority of their positions. It is not clear either whether this was an isolated instance or "par for the course," although no evidence of any such consistent pattern was proffered by the General Counsel. Even examining the above incident (and perhaps others in the record) in the most favorable light toward the General Counsel, the existential problem in this instance is that there is one crucial, indispensable element of proof needed to establish the authority to "responsibly direct" which is missing here: evidence that the putative supervisors (MSs) are held accountable by Respondent for the performance of those under them. Thus, as the Board stated in *Oakwood Healthcare*, 348 NLRB at 691−692, "for direction to be 'responsible,' the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly."

No such evidence exists in this case. To the contrary, Savage testified that MSs are not in any way held responsible for the performance (or conduct) of engineers and other maintenance department employees—and no evidence was introduced to refute such testimony. In light of this, I conclude that the record fails to establish that MSs had the authority to "responsibly direct" others, as required under Section 2(11).

[65] It was proper to notify the MSs in such situations because in a sense they acted as coordinators or liaisons between the engineers and the dispatching system, in order to keep the system working smoothly.

Finally, as discussed at length in the facts section, much evidence was introduced in the record by the General Counsel for the apparent purpose of showing "secondary indicia" of supervisory status to augment, or support, the primary indicium of supervisory status in evidence. There are two reasons, however, why these additional factors are not truly relevant or helpful. First, much of the evidence introduced in this regard was far from conclusive. Thus, for example, MSs received higher wages than some, but not all, maintenance department employees; MSs had their own desks, but so did others in the department; they could call outside vendors to request price estimates for services but had no authority to approve expenditures for such services; MSs wore somewhat different attire than others in the department, but the name tags for all employees did not reveal their position or rank; the job descriptions for MSs, written long before Respondent took over the facility, suggested possible supervisory authority, but those job descriptions were no longer in effect and the parties had agreed in collective bargaining to change their titles to "Lead Engineers," who were part of the bargaining unit. Most importantly, however, in the absence of at least one of the 12 characteristics or functions of supervisory status enumerated in Section 2(11), secondary indicia must not be considered. *Pacific Beach Corp.*, 344 NLRB 1160, 1161 (2005), and cases cited therein. As I have discussed above, the General Counsel has failed to meet its burden of proof to show that the putative supervisors herein had any of the 12 functions ("primary indicia") of supervisory authority enumerated in Section 2(11).

Accordingly, and for the above reasons, I conclude that the record evidence falls far short of the threshold necessary to establish that MSs Rau, Sutton, and Cooke were supervisors within the meaning of Section 2(11) of the Act, and thus find that they were not.

2. The lawfulness of Respondent's withdrawal of recognition from the Union

As discussed earlier, Respondent withdrew recognition from the Union on September 8, 2017, based on a petition signed by 13 individuals in a bargaining unit comprised of 24 maintenance department employees. Three (3) of the signatures in that petition belonged to Rau, Sutton and Cooke, and if they were found to be 2(11) supervisors, there would only be 10 valid signatures in a unit now reduced to 21 employees, less than a majority. In those circumstances, the withdrawal of recognition would have been invalid and thus unlawful, as alleged in the complaint. I have found, however, for the reasons discussed above, that the evidence does not support a finding that these three individuals are 2(11) supervisors. Accordingly, these individuals were part of the bargaining unit and their signatures could be validly relied upon to withdraw recognition from the Union. The September 8 withdrawal of recognition by Respondent was thus lawful.

There is, however, a "twist" to this story that was not considered (or mentioned) by the General Counsel, Respondent or the Charging Party in their post hearing briefs. This "twist" provides an alternate theory in support of my conclusions as discussed above. Thus, almost all on the evidence adduced during the hearing related to the duties, responsibilities, and possible 2(11) authority of MSs Rau and Sutton, who worked the "day time" shifts, during which most of the maintenance-related activity took place. Very little evidence was related to Cooke, whose testimony was relatively short, and who unlike Rau and Sutton, was never recalled to the stand. If the evidence as to Rau and Sutton was lacking, it was lacking far more significantly as to

Cooke. Section 2(11) supervisory status must be established by specific, affirmative evidence in each case and as to each individual, and thus it cannot be assumed that if Rau and Sutton are found to be statutory supervisors, that Cooke must also be one because he held the same paper "title" of "Maintenance Supervisor" (MS) as they did. Thus, if Rau and Sutton are found to be statutory supervisors despite the evidence discussed above, I believe nevertheless that the evidence as to Cooke is simply not there. In this scenario, the elimination of Rau's and Sutton's signatures from the petition would leave 11 valid signatures in a unit now consisting of 22 employees, including Cooke. Since continued recognition of the Union is premised on their support from a majority of the employees in the unit, the 11 remaining employees who did not sign a petition do *not* constitute a majority, since majority means 50 percent plus 1. Accordingly, in such scenario, the petition would still provide a lawful basis for Respondent to withdraw recognition from the Union.

In light of the above, I conclude that Respondent did not violate Section 8(a)(5) & 1) of the Act by withdrawing recognition from the Union, as alleged in the complaint.

3. Respondent's failure to execute the contract

In light of my conclusion that Respondent lawfully withdrew recognition form the Union on September 8 based on the petition signed by employees, the allegation that Respondent thereafter failed to execute the contract signed by the Union after the withdrawal of recognition is moot and lacks merit. In any event, as discussed earlier, the parties stipulated that if the withdrawal of recognition by Respondent was invalid, the contract would be in effect, which renders this allegation academic.

CONCLUSIONS OF LAW

1. Hilton Resorts Corporation d/b/a Elara ("Respondent") is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Union of Operating Engineers (Union on Local 501) is a labor organization within the meaning of Section 2(5) of the Act.

3. By refusing to allow union representation to an employee (Giovanni) who had requested such representation during an investigatory interview he reasonably believed could lead to discipline, Respondent has interfered with, restrained and coerced employees in their exercise of their Section 7 rights, in violation of Section 8(a)(1) of the Act.

4. Respondent did not otherwise violate the Act as alleged in the amended consolidated complaint.

5. The unfair labor practice(s) committed by Respondent, as described above, affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

The appropriate remedy for the 8(a)(1) violations I have found is an order requiring Hilton Resorts Corporation d/b/a Elara ("Respondent") to cease and desist from such conduct and take certain affirmative action consistent with the policies and purposes of the Act.

Specifically, having found that Respondent violated Section 8(a)(1) of the Act by refusing to allow union representation to an employee who had requested such representation during an investigatory interview the employee reasonably believed could lead to discipline, I shall recommend that Respondent be ordered to cease and desist from such conduct. Additionally, Respondent will be required to post a notice to employees assuring them that Respondent will not violate their rights in this or any other related manner in the future. Finally, to the extent that Respondent communicates with its employees by email or regular mail, it shall also be required to distribute the notice to employees in that manner, as well as any other means it customarily uses to communicate with employees.

Accordingly, based on the forgoing findings of fact and conclusions of law, and on the entire record, I issue the following recommended[66]

ORDER

Respondent, Hilton Resorts Corporation d/b/a Elara, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) refusing to allow union representation to an employee who had requested such representation during an investigatory interview the employee reasonably believed could lead to discipline .

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the purposes and policies of the Act.

(a) Within 14 days after service by the Region, post at all its facility in Commerce, California, where notices to employees are customarily posted, copies of the attached notice marked "Appendix."[67] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by

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[66] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[67] If this Order is enforced by a Judgment of the United States court of appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "Posted Pursuant to a Judgment of The United States Court of Appeals Enforcing an Order of The National Labor Relations Board."

the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 14, 2017.

(b) Within 21 days after service by the Region, file with the Regional Director for Region 28, a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. November 26, 2018

Ariel L. Sotolongo
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefits and protection
Choose not to engage in any of these protected activities.

In recognition of these rights, we hereby notify employees that:

WE WILL NOT deny your rights to union representation at an investigatory interview in which you reasonably believe that discipline may result.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed by Section 7 of the Act.

Hilton Resorts Corporation d/b/a Elara
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

2600 North Central Avenue, Suite 1800
Phoenix, Arizona 85004-3099
Hours: 8:15 a.m. to 4:45 p.m.
602-640-2160.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/28-CA-193521 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (602) 416-4755.